IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 291

MARION KOTCH, ET AL.,

Appellants,

vs.

BOARD OF RIVER PORT PILOT COMMISSIONERS FOR THE PORT OF NEW ORLEANS, ET AL.,

Appellees.

REPLY BRIEF FOR APPELLEES IN SUPPORT OF MOTION TO DISMISS.

ARTHUR A. MORENO,

[illegible]

WM. B. LEMLE,

LOUIS G. LEMLE,

Of Counsel.

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May It Please the Court:

In the brief of appellants, it is insistently said that the case of *Olsen v. Smith*, *195 U. S. 332*, "fairly considered, supports appellants." We, with equal insistence and more vehemence, insist that however considered, the cited case does not support the contention of appellants.

It is also said that in order to understand the decision in *Olsen v. Smith*, *supra*, the jurisprudence leading up to its decision must be reviewed. The review of the Texas jurisprudence is not a review of the jurisprudence

of the United States Supreme Court leading up to the decision of *Olsen v. Smith, supra.* The decision of the Supreme Court of the United States does not require any light from a review of the jurisprudence of the Texas Court. The statement of the case, the grounds of decision, and the decision of *Olsen v. Smith* itself are clearly stated, and destroy the possibility of any ambiguity requiring explanation by the history of Texas jurisprudence.

This court said clearly that it would accept interpretation of statutes as made by the Supreme Court of the state whose legislative enactment was under attack. The Supreme Court of Louisiana has answered all of the questions which were propounded in the lower court and are presently urged here. The only question before this court is the constitutionality of the statute when tested by the 14th Amendment of the Constitution of the United States.

All of the reasoning of the Texas Court set out at length in *Petterson v. Board of Commissioners,* 50 S. W. 1002, can have absolutely no bearing on the decision of the matter here. What was said by the Texas Court sheds no light on the problem here. Your Honors are dealing solely with a decision of the Supreme Court of Louisiana and the validity of that decision must rest upon the principles of federal law and not upon the principles of Texas law. It would serve no useful purpose to analyze what was said by the Texas court, because Your Honors have already enunciated decisions which are decisive here and which are not overruled or nullified by reasoning of the Texas Court. What is said in the brief of the appellants from page six including page nineteen, fattens the brief, but

does not enlighten the court on an issue based upon the 14th Amendment of the Constitution of the United States to be decided by the Supreme Court of the United States.

Your Honors, after disposing of all of the issues arising out of the special terms of the Texas statute, reached the final issue in that case and the issue here and, in *Olsen v. Smith*, said the following:

> "It remains only to consider the contention based upon the 14th Amendment and the anti-trust laws of Congress. The argument is, that the right of a person who is competent to perform pilotage services and to render them is an inherent right guaranteed by the 14th Amendment, and that therefore all state regulations providing for the appointment of pilots and restricting the right to pilot to those duly appointed, are repugnant to the Fourteenth Amendment. But this proposition in its essence simply denies that pilotage is subject to governmental control, and therefore is foreclosed by the adjudications to which we have previously referred. The contention that because the commissioned pilots have a monopoly of the business, and by combination among themselves exclude all others from rendering pilotage services, is also but a denial of the authority of the State to regulate, since if the State has the power to regulate, and in so doing to appoint and commission those who are to perform pilotage services, it must follow that no monopoly or combination in a legal sense can arise from the fact that the duly authorized agents of the State

> are alone allowed to perform the duties devolving upon them by law. When the propositions just referred to are considered in their ultimate aspect, they amount simply to the contention, not that the Texas laws are void for want of power, but that they are unwise. If an analysis of those laws justified such conclusion—which we do not at all imply in the case—the remedy is in Congress, in whom the ultimate authority on the subject is vested, and cannot be judicially afforded by denying the power of the State to exercise the authority over a subject concerning which it has plenary power until Congress has seen fit to act in the premises."

We are at a loss from a reading of the decision in *Olsen v. Smith* to understand upon what ground appellants say that because the Texas Court held that a period of apprenticeship was merely directory and not mandatory, that, therefore, Your Honors upheld the constitutionality of the statute on that ground. There is not a single word, nor the suggestion of a syllable, that Your Honors upheld the constitutionality of the statute because of something said by the Texas Court.

Your Honors upheld the constitutionality of the Texas statute upon the ground that until Congress had legislated, the State of Texas had plenary power to regulate pilotage. Your Honors clearly held that the states had full power to regulate pilotage and that a person competent to perform pilotage service does not have the inherent right to be appointed a pilot. It held that the states, in providing who should be pilots, had complete

power over the appointment of pilots and that in the exercise of such complete power, there was no violation of the 14th Amendment, because only those having a constitutional right to be appointed pilots could claim the benefit of the 14th Amendment; and, since the appellants in that case had no inherent right to such appointment, they did not come within the benefits of the 14th Amendment.

The proposition here asserted is that only those applicants who have served an apprenticeship are eligible, and since the only way to serve an apprenticeship is by the grace of the commissioned pilots, that there is thereby created, a monopoly by those who are already commissioned pilots. Your Honors have squarely and unequivocally answered that contention in the cited case by saying that the argument attacks the wisdom of the law, but does not invoke constitutional correction. Your Honors have said that the corrective of the unwisdom of the law does not lie within the province of the court, but within the power of Congress to change the law.

We, therefore, respectfully say that all of the discussion of the decisions by the Texas Court is, "so much whistling in the wind." The decisive reasoning is found in the jurisprudence of the Supreme Court of the United States. The summation of that reasoning is found in the quoted part of *Olsen v. Smith, supra*. We respectfully say that no power of reasoning can differentiate this case from the cited case when tested by the constitutional question here involved. Whatever might have been the *ratione decidendi* of the Texas Court is not controlling here. The

reasoning of this court and the decision in *Olsen v. Smith*, *supra*, should be decisive of the issue tendered. *Olsen v. Smith* answers every question raised by the appellant here and specifically destroys such contentions completely. Therefore, the appeal should either be dismissed, or the judgment of the lower court affirmed.

Respectfully submitted,

ARTHUR A. MORENO,
Counsel for Appellees.

SELIM B. LEMLE,
LOUIS G. LEMLE,
Of Counsel.